

NTSB Order No. EA-4393

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 15th day of September, 1995

Docket SE-14146

failure to appear at the hearing.<sup>1</sup> On appeal, the respondent claims that he was not aware that a hearing had been scheduled in his case<sup>2</sup> and requests that the matter be remanded for another hearing at which he can present a defense to the Administrator's charges, which he denies.<sup>3</sup> We will grant the request, for it appears that respondent did not have actual or constructive knowledge that a hearing on his appeal had been scheduled.

The respondent asserts, without contradiction, that he began travel away from his residence on July 9, with the intention of returning on or about August 17,<sup>4</sup> and that he did not learn of the hearing until August 16, when he in fact returned and collected his mail. Assuming the truth of these assertions, respondent could not have known that a hearing had been scheduled in his case because the Board did not even acknowledge his July 2 appeal, and provide him with a copy of the Board's rules of practice, until July 12, and the notice of hearing was not sent

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<sup>1</sup>Since the law judge, who assumed that the respondent had chosen to withdraw his appeal, took no evidence on the Administrator's charges, he should have simply dismissed the appeal, not affirmed the revocation.

<sup>2</sup>Counsel for the Administrator denies respondent's additional claim that the FAA knew that he would not be available for a hearing on August 14 and that because of his travel schedule he did not want to have a hearing in the matter before October. Our disposition here makes it unnecessary for us to attempt to resolve this dispute.

<sup>3</sup>The June 20, 1995 Emergency Order of Revocation alleges that respondent, in connection with the sale of a parachute he had packed, violated sections 65.129(b)(d) and (e) and 65.131(c) of the Federal Aviation Regulations, 14 CFR Part 65.

<sup>4</sup>Before leaving the respondent requested that his local Post Office hold his mail, effective July 11.

to him until July 17. Thus, respondent had not received, before beginning his travel, any information relevant to the appeal process he had initiated, including, among other things, advice on the necessity or timeframe for filing a timely answer to the revocation order.<sup>5</sup>

While respondent's lack of knowledge that a hearing had been set would not, by itself, justify a rescheduling, there are other factors dictating such a result here. The first is that we are reluctant to hold that respondent could be said to have received valid constructive service of the notice of hearing, since the copy of the notice we sent to him would not actually have been delivered to his residence, as all of his mail was being held for him at the post office until his return from his business trip. The second, more important, consideration stems from our discovery that the notice of hearing was served on the respondent by regular, rather than by certified, mail, as our rules require. See 49 CFR Section 821.8(a).

Because that requirement was not followed in this instance, it makes no difference that respondent may be mistaken as to whether he included advice as to his availability with his notice of appeal or that he arguably could have done more than he says

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<sup>5</sup>Respondent asserts that his July 2 appeal from the revocation order "requested that the hearings be delayed until on or about October due to emergency federal official travel on a constant basis until that time" (Motion of Appeal, page 1). The case docket does not contain such a request. However, we will treat respondent's assertion as an indication that he wanted to waive the expedited procedures the Board follows in emergency appeals.

he did to ensure that the Board did not schedule a hearing on his appeal that he would not be able to attend.<sup>6</sup> Our own failure to comply with a published responsibility respecting the transmission of this vital information to the respondent counsels against a judgment predicated on any oversight for which he also may be accountable in this connection.<sup>7</sup> Compare Administrator v. Gryder, 6 NTSB 683 (1988) (Rejecting late notice of appeal where respondent, who failed to claim certified mail containing a notice of hearing, was unaware, through lack of diligence in keeping Board apprised of his whereabouts, that hearing had taken place in his absence).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is granted;
2. The order of the law judge is vacated; and
3. The proceeding is remanded for a hearing on the merits of the charges in the complaint.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

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<sup>6</sup>Respondent could, for example, have checked with the Board after mailing his notice of appeal to verify that it, and his preference concerning the timing of any hearing, had been received.

<sup>7</sup>If the notice of hearing had been sent by certified mail, it would have been returned to the Board, presumably with advice as to the reason for the nondelivery and, in all likelihood, in time to prevent the law judge and the Administrator's counsel and his witnesses from undertaking unnecessary travel.